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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Multimedia Cablevision, Inc.,)
)
Complainant,)
)
v.)
)
Southwestern Bell Telephone)
Company,)
)
Respondent.)

CS Docket No. 96-181
PA 95-008

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To: The Honorable Arthur I. Steinberg, Administrative Law Judge

OPPOSITION TO MOTION FOR ACCEPTANCE OF APPEARANCE

Southwestern Bell Telephone Company ("SWBT"), pursuant to Section 1.294(b) of the Commission's Order, hereby files its Opposition to the Motion for Acceptance of Appearance ("Motion") filed by Multimedia Cablevision ("Multimedia") on October 3, 1996 in the above-captioned matter.

1. Pursuant to paragraph 45 of the Hearing Designation Order ("HDO") in the above-captioned matter, Multimedia's Section 1.221 Notice of Appearance ("Appearance") was due to be filed on September 23, 1996. SWBT and the Commission's trial staff each filed Appearances on September 23, 1996 and served copies of their Appearances on Multimedia. Multimedia filed its Appearance ten (10) days late on October 3, 1996.

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2. Section 1.221(c) provides in pertinent part as follows:

In order to avail himself of the opportunity to be heard, the applicant, in person or by his attorney, shall, within 20 days of the mailing of the notice of designation for hearing by the Secretary, file with the Commission, in triplicate, a written appearance Where an applicant fails to file such a written appearance within the time specified, or has not filed prior to the expiration of that time a petition to dismiss without prejudice, or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the application will be dismissed with prejudice for failure to prosecute.¹

3. According to the strict terms of Section 1.221, if Multimedia was not going to file its Appearance within twenty (20) days of the HDO's mailing date, it was required to file, "prior to the expiration of that time . . . a petition to accept, for good cause shown, such written appearance beyond the expiration of said 20 days." Given that Multimedia did not file its Appearance or its Motion until ten (10) days after their due date, Section 1.221 requires that its Complaint be dismissed with prejudice. See LRB Broadcasting, 8 FCC Rcd 3076 ¶4 (1993).

4. Notwithstanding the provisions of Section 1.221(c), even when parties have not filed requests for extension on or before the appearance date, they have been allowed to file Appearances late when they have shown good cause with reliable evidence for failing to meet the appearance filing deadline. For example, proof that the party did not know about the hearing designation order and that it was mailed to the wrong address was sufficient to extend the appearance date in one case. Darrell Spann, 6 FCC Rcd 5944 ¶6 (1991).

5. Multimedia's only attempt to show "good cause" for filing its Appearance ten (10) days late rather than by its due date is the following: "While the HDO designated this

¹ 47 C.F.R. §1.221(c) (emphasis added).

matter for hearing, Multimedia has received no notice of any hearing date, pre-hearing conference or assignment of this matter to a designated Administrative Law Judge (“ALJ”), as has been done in prior pole cases assigned to ALJs.” Motion, ¶3. This statement is insufficient to demonstrate “good cause” for Multimedia’s filing of its Appearance ten (10) days late.

6. Multimedia acknowledges receiving the HDO. Multimedia does not claim that it was unaware of the HDO prior to the due date for Appearances. In fact, Multimedia acknowledges in its Motion that it was aware of the obligation to file factual submissions within thirty (30) days, as required by paragraph 46 of the HDO. And yet, Multimedia failed to comply with the requirement in paragraph 45 of the HDO that it file an Appearance within twenty (20) days.

7. Multimedia apparently contends that it did not file its Appearance on time because it expected some additional notice from the Commission, such as notice of (1) a hearing date; (2) a prehearing conference or (3) assignment of the matter to an ALJ. Paragraph 45 of the HDO provided ample notice of the pertinent obligation, in order to be heard, of “filing with the Commission a Notice of Appearance in accordance with Section 1.221 of the Rules . . . within twenty (20) days of the mailing of this Order.” HDO, ¶45 (footnote omitted). The HDO and the rules do not provide for an additional reminder or other notice preceding the obligation to file the Appearance and pay any applicable hearing fee.

8. There are a number of cases in which a party has forfeited its right to participate in a hearing proceeding due to a late-filed Appearance or hearing fee - even when evidence of “good cause” was presented. In these cases, the evidence of “good cause” was deemed

insufficient. See, e.g., Gerald E. Davis, 9 FCC Rcd 3016 (1994); LRB Broadcasting, 8 FCC Rcd 3076 (1993); Crystal Clear Communications, Inc., 7 FCC Rcd 6462 (1992); Darrell Spann, 6 FCC Rcd 5944 (1991); CSJ Investments, Inc., 5 FCC Rcd 7653 (1990); Juan Galiano, 5 FCC Rcd 6442 (1990). Of course, there are also numerous cases in which a party's late-filed applications or other filings were rejected as untimely. See, e.g., Mary Ann Salvatoriello, 6 FCC Rcd 4705 (1991).

9. In Silver Springs Communications, 3 FCC Rcd 5049 (1988), the ALJ and the Review Board concluded that good cause had not been shown by unsubstantiated allegations that Silver Springs Broadcasting never received the Commission's hearing designation order and did not learn of the case being designated for hearing until after the deadline for Appearances. That decision was based in part on the failure to provide affidavits or other evidence to show "good cause." Here, in contrast, Multimedia had notice of the HDO but failed to comply with an express requirement it contained. Multimedia's vague allegations concerning some other notices it expected to receive clearly do not measure up to the standard of "good cause" required in previous decisions under Section 1.221(c). Contrary to Multimedia's contentions, timely filing of Appearances is not merely a matter of "administrative convenience." Motion, ¶4. In effect, Multimedia's position is that it need not show "good cause" for filing its Appearance ten (10) days late because it is a mere formality. Multimedia's position conflicts with the above-cited precedent that requires reliable evidence of good cause for the failure to comply with this procedural rule in a timely manner.

10. If Multimedia's explanation is sufficient to show "good cause" for failure to meet the requirements of Section 1.221 or other similar procedural requirements, then the Commission's standards for "good cause" would be lenient and undemanding indeed. This approach to Section 1.221 would be inconsistent with previous cases. For example, if Multimedia's vague allegations about other notices it expected is sufficient, then a misdirected pleading (CSJ Investments, Inc., 5 FCC Rcd 7653 (1990)) or lack of actual notice of new filing procedures (Gerald E Davis, 9 FCC Rcd 3016 (1994)) should be sufficient to show "good cause," but these and other circumstances have been found to be insufficient.

11. By failing to provide evidence of "good cause" for its failure to file a timely Appearance, Multimedia apparently believes that timely compliance with Section 1.221 is subject to a less demanding standard in this type of hearing proceeding versus others. Although the Commission has established some differences in its standards of "good cause" for late filing, Multimedia has not provided any evidence at all of "good cause". For example, a waiver of application filing deadlines requires a showing of extreme circumstances such as an earthquake or a power outage. In contrast, the Commission has described the standards for adjudicatory proceedings as follows:

7. In demonstrating good cause in connection with adjudicatory pleadings, a party before the Commission must provide a legitimate reason for not being able to file pleadings within the time specified. Those reasons may differ depending on the circumstances. Generally, however, miscalculation of days within which to file, the failure of courier services, computer and copying equipment malfunctions, and other aspects of document preparation and filing do not constitute "good cause."

Merideth/New Heritage Strategic Partners, L.P., 9 FCC Rcd 6841, 6842 ¶7 (1994) (footnotes omitted; emphasis added). The Commission has not established a more lenient standard for pole attachment adjudicatory pleadings. In any event, Multimedia has not provided a legitimate reason for its late filing.

For the reasons discussed above, the Commission should deny Multimedia's Motion and dismiss its Complaint with prejudice.

Respectfully submitted,

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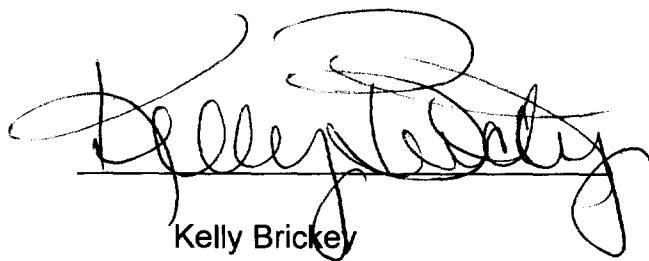
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October 15, 1996

CERTIFICATE OF SERVICE

I, Kelly Brickey, hereby certify that the foregoing "Opposition to Motion for Acceptance of Appearance, of Southwestern Bell Telephone", has been served October 15, 1996 to the Parties of Record.



Kelly Brickey

October 15, 1996

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